Supreme Court, U.S.
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No. 79-170

In the Supreme Court of the United States

OCTOBER TERM, 1978

JAMES J. RYAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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In this federal tax refund suit petitioner challenges the decision below upholding an assessment against him for personal liability for unpaid withholding taxes of the corporations pursuant to 26 U.S.C. 6672, on the grounds that the jury instructions did not adequately describe the willfulness requirement of the statute and that the verdict was not supported by the evidence.

The pertinent facts may be summarized as follows: O'Hare Installations, Inc., and O'Hare Warehouse, Inc., the two corporations whose unpaid withholding taxes are involved here, were organized in 1971, along with a third corporation, Carpet Direct, Inc., as part of an integrated

business operation, to conduct the various phases of the business of selling, storing and installing carpeting and other flooring (Tr. 58-59, 208)[1]

O'Hare Warehouse and O'Hare Installations conducted business from the time of their formation to 1972 until serious financial difficulties finally forced them to cease operations. During the last several months of their existence, both corporations filed employer's quarterly federal tax returns which showed withholding taxes due, but did not pay those taxes. The Commissioner determined that petitioner was a person responsible for the collection and payment over of the withholding taxes of both corporations, and, accordingly, imposed personal liability for the unpaid taxes pursuant to 26 U.S.C. 6672. Petitioner paid a portion of the assessment and, upon the Commissioner's denial of his claim for a refund, commenced this action in the United States District Court for the Eastern District of Illinois, seeking a refund of the amount paid and an abatement of the remaining portion of the assessment (R. 1). The jury returned a verdict finding petitioner personally liable for the withholding tax and the district court entered a judgment in accordance with the verdict. (R. 35). The court of appeals affirmed (Pet. App. 1a-2a).

1. The court of appeals correctly held that the evidence was sufficient to support the jury's verdict that petitioner was liable for his corporation's unpaid withholding taxes. The record shows that petitioner was a person required to collect and pay over the withholding taxes of O'Hare

[1] "R." refers to the record appendix filed in the court of appeals. "Tr." refers to the transcript of the proceedings in the district court, and "GX" refers to Government exhibits introduced at trial.

Warehouse, Inc. and O'Hare Installations, Inc., because he had both the authority and the opportunity to apply corporate funds to satisfy the tax liability. See *Adams* v. *United States*, 504 F. 2d 73 (7th Cir. 1974); *Monday* v. *United States*, 421 F. 2d 1210 (7th Cir. 1970). Contrary to his claim (Pet. 5) that he was merely a salesman for the corporations, the evidence showed that petitioner participated in a wide variety of business transactions on behalf of the corporations, including the negotiations of the lease for their office space, the negotiations of a warehousing agreement, and the execution of a guarantee of indebtedness to secure a line of credit on behalf of both corporations. In business transactions, he often represented that he was an officer of those corporations. Moreover, petitioner was primarily responsible for the hiring and firing of corporate employees, and was authorized to draw checks, on his sole signature, on the bank accounts of Carpet Direct, Inc., from which the bulk of the expenses of the other two corporations were paid (Tr. 211, 218; GX 29, 30, 31, 32). He was described (Tr. 221, 264) as "the general overseer of the * * * whole organization," and "the brains behind the organization."[2]

The evidence also supports the verdict that petitioner willfully caused the corporations to be unable to meet their withholding tax obligations. For purposes of Section 6672, "willful" requires only that the actions of the responsible person obligated to pay the corporation's

[2] *Bauer* v. *United States*, 543 F. 2d 142 (Ct. Cl. 1976), *Bernardi* v. *United States*, 507 F. 2d 682 (7th Cir.), cert. denied, 422 U.S. 1042 (1975), and *White* v. *United States*, 372 F. 2d 513 (Ct. Cl. 1967), upon which petitioner relies (Pet. 8), do not support his claim that he was not a responsible officer. As petitioner acknowledges (Pet. 8), the determination of the existence of a duty to pay over taxes withheld from the wages of corporate employees turns largely on the facts of each case. See *Bauer* v. *United States*, *supra*, 543 F. 2d at 148.

withholding taxes, were voluntary, conscious, and intentional. *Sorenson* v. *United States*, 521 F. 2d 325, 327 (9th Cir. 1975); *Adams* v. *United States*, *supra*; *Monday* v. *United States*, *supra*. The person who signed the corporate tax returns (Edward Foley) testified that at the time the tax returns for the periods in question were prepared, he discussed with petitioner the fact that corporate funds were insufficient to meet the withholding tax obligations shown on the returns. Nevertheless, the corporations continued to pay the full amount of their employees' net wages at a time when they had insufficient funds to pay the withholding tax obligations incurred on those wages, as well as various other expenses of the corporations, such as the rent on the building in which their offices were located.

2. Contrary to petitioner's contention (Pet. 8-10), the trial court's instructions to the jury adequately described the willfulness requirement of Section 6672, for purposes of civil tax liability. They leave no room for speculation that the jury might have been misled into believing that liability under Section 6672 may be based upon mere negligence. The court defined the term "willfully" as meaning that "the act of failing to pay over the taxes was voluntarily, consciously, and intentionally done" (R. 53) and stated that in order to find that petitioner acted willfully, they must find that he "made the deliberate choice to pay other creditors instead of paying the Government" (R. 53). The accuracy of the instructions is illustrated by the court's final statement that "[a]ll that is required for you to find the responsible officer acted

willfully is that he knew the taxes were due and owing, funds were available, and did not pay the funds over to the Government" (R. 56).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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